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IN THE
Supreme Court of the United States
October Term, 1996

THE DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, A STATE AGENCY, AND LAWRENCE FUCHS, EXECUTIVE DIRECTOR OF THE DEPARTMENT OF REVENUE,

Petitioners,

v.

SHARE INTERNATIONAL, INC.,

Respondent.

BRIEF OF *AMICUS CURIAE*, DIRECT MARKETING ASSOCIATION, INC., IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Florida courts correctly applied the substantial nexus test in declining to impose use tax collection duties on a small mail order company which displayed and sold some of its materials at four brief seminars over a period of five years.

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INTRODUCTION

The Direct Marketing Association, Inc. respectfully submits this brief in opposition to the petition for *certiorari*. Written consents from the parties are filed herewith.

STATEMENT OF INTEREST

I. *DMA: An Overview*

The Direct Marketing Association, Inc. ("DMA"), a not-for-profit corporation, is the oldest and largest trade association representing mail order sellers and advertisers. DMA has over 3,200 members from all 50 states and 40 foreign countries. Most of DMA's members, like Respondent Share, are small businesses. Approximately 85% of DMA's members have annual sales of $10 million or less. Like Share, more than 20% employ fewer than four people, including "mom and pop" operations that still prepare catalogs on kitchen tables and in home offices.

Since the late 19th century, mail order marketing has attracted fledgling businesses and entrepreneurs who recognize the enormous opportunity of selling their products nationally. Through direct marketing, companies with limited resources, but ambitious aspirations, have been able to market their goods country-wide, despite most being located in areas removed from America's great urban centers.

II. *DMA's Interest In This Case*

Most of DMA's members sell by means of interstate commerce. They send catalogs and other advertising materials through the mail, receive orders by mail or telephone, and deliver goods by common carriers. DMA's members have been beneficiaries of the free and open trade created by the Constitution's Commerce Clause; therefore, DMA has a special interest in the Commerce Clause test for deciding when out-of-state sellers must collect and remit state and local use taxes on mail order sales.

In planning their business structure and activities, DMA's members have relied on a long line of Supreme Court decisions, including *Scripto, Inc.* v. *Carson*, 362 U.S. 207 (1960), *Na-*

tional Geographic Soc'y v. *Calif. Bd. of Equalization*, 430 U.S. 753 (1977), *Tyler Pipe Industries* v. *Wa. State Dept. of Revenue*, 483 U.S. 251 (1987), and *Quill* v. *North Dakota*, 504 U.S. 298 (1992). These decisions all hold that a direct marketer must have a "substantial nexus" with a state before burdensome use tax collection obligations can be imposed.

Over the years, the Court has rejected state efforts to lower the Commerce Clause threshold for use tax collection. *See, e.g., National Geographic Soc'y, supra*, 430 U.S. at 556 (rejecting California's effort to replace substantial nexus with a "slightest presence" test). Just four years ago in *Quill* v. *North Dakota*, this Court again reaffirmed its substantial nexus principle in the face of one state's effort to replace it with an ethereal "economic presence" approach.

Since *Quill* was decided, most state courts have had little problem in applying the substantial nexus standard. Yet, despite this, several state tax departments have attempted to erode direct marketers' Commerce Clause rights. This case is an example. In their brief before the Supreme Court of Florida, Petitioners invited that court to create a *new* constitutional rule under which *any* physical presence in the taxing state — no matter how brief or how slight — would create a substantial nexus. "It matters not," the Department unsuccessfully argued, whether an in-state presence lasts for "6 hours," or for "3 seconds or 3 days." (Department "Initial Brief," October 27, 1995 ("Dep. Brief") at 38). The Supreme Court of Florida, in a decision consistent with all of the recent decisions of its sister states, rejected this invitation to depart from *Quill*. Instead, it carefully reviewed the facts, analyzed governing Supreme Court precedent and applied the Court's decisions in a practical and commercially responsible manner. It properly concluded that Share could not be enlisted by Florida to collect and remit use taxes because of its extremely limited and infrequent contacts with the state.

Were this Court to adopt the Department's "trip wire" nexus test, the blow to DMA's members would be devastating. Such a

decision would undermine the objectives of Commerce Clause jurisprudence and inhibit interstate business generally. It would impose burdens incommensurate with the minimal presence reflected in this case. As this Court recognized in *Quill* v. *North Dakota*, if one state succeeds in weakening the substantial nexus rule, other states and localities are bound to follow suit. Use tax obligations "might be imposed by the Nation's 6,000-plus [tax] jurisdictions," forcing direct marketers to cope with "many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements, . . . [which] could entangle [direct marketers] in a virtual welter of complicated obligations." 504 U.S. at 313 n.6 (citation omitted) (quoting *National Bellas Hess* v. *Ill. Rev. Dept.*, 386 U.S. 753 (1967)). An avalanche of audits, subpoenas, assessments, and lawsuits would follow.

The Department's proposed new nexus standard would undoubtedly be enforced against direct marketers for prior tax years — just as Petitioners are attempting to do against Share. Enormous back tax assessments, including disproportionate amounts of interest and penalties, would confront direct marketers throughout the country — with unforeseen and potentially bankrupting consequences.

STATEMENT OF THE CASE

The facts found by the trial court were never challenged or modified. Among them, Share, an out-of-state mail order company, had national gross sales of $3 million a year, and participated in four seminars in the State of Florida over the course of a five-year audit period. These seminars took place each November of 1986, 1987, 1988, and 1989, and lasted no longer than three days. All four seminars, which were neither organized nor run by Share, were designed to attract chiropractors from outside of Florida. Fully 84% of the attendees were

from out of state. Aside from these seminars, Share had no contact with Florida. Petitioners dispute none of this.

At these four weekend seminars, Share displayed and sold some of its products, the majority of which were written materials. Share voluntarily collected the Florida sales tax on those sales under a seller's permit obtained for that specific purpose, remitting an average of $7,855.98 in taxes per seminar. As the trial court later found, Share neither intended to establish nor created a customer base in Florida by its involvement with these seminars. During proceedings below, Petitioners fully accepted these factual findings.

The Department assessed Share for sales and use taxes for 1985 through 1990, contending that Share's presence at the seminars obligated the company to collect and remit use taxes on its mail order sales. Notably, the assessment covered the 12-month period *prior to* Share's first attendance at a three-day seminar in November of 1986. The assessment also covered all of 1990, likewise a year in which Share attended *no* seminars in Florida. Share successfully filed an action to declare the assessment unconstitutional.

REASONS FOR DENYING THE WRIT

This case involves whether Share had a sufficient physical presence in Florida to obligate it to collect and remit Florida use taxes. The United States Supreme Court addressed this issue just four years ago in *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992). *Quill* reaffirmed that, before such duties can be imposed, the Commerce Clause requires companies like Share to have a substantial nexus with the taxing state. Like virtually every state court since *Quill*, the Supreme Court of Florida understood and applied this Commerce Clause test in a fair and reasonable way and concluded that the substantial nexus requirement had not been met. DMA accordingly believes that a grant of *certiorari* is unwarranted.

I. The Petition Repeatedly Misstates That The Courts Below Applied A "Substantial Physical Presence" Test When, In Fact, Those Courts Utilized *Quill*'s "Substantial Nexus" Test.

Petitioners' hopes for *certiorari* are pinned on repeated and serious misstatements regarding the decisions below. The petition repeatedly *misquotes* the courts as having applied a "substantial physical presence" test to Share, rather than *Quill*'s "substantial nexus" test. These misquotations occur from one end of the petition to the other; from the Question Presented on page i to Petitioners' final description of the case on page 24.[1] These inaccurate quotations and improper characterizations of the lower court decisions are misleading and confusing.

To set the record straight, the courts below never invoked, referred to, or applied a "substantial physical presence" test. Those words do not appear in their decisions. Rather, the courts below correctly applied the substantial nexus standard to this case. By repeatedly intoning the irrelevant phrase "substantial physical presence," the Petitioners would have this Court believe that this case cries out for the extraordinary privilege of Supreme Court review. It does not.

II. The Petitioners' Request To Erect A New Commerce Clause Standard Should Be Denied.

In proceedings below, Petitioners urged the lower courts to impose use tax collection obligations on the basis of a trip-wire physical presence test. In the Petitioners' own words, dipping "one toe" is enough; entering Florida for "3 seconds or 3 days" is enough; a brief airport encounter will do. (Dept. Br. at 24 n.15, 38). This Court previously rejected a similar effort to

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[1] On 11 occasions in their brief the Petitioners misquote the Florida courts in this way. (Petition For Writ of Certiorari ("Petition") at i, iv, 11, 15, 16 (twice), 17, 18 (three times), 24.)

eviscerate the Commerce Clause's "substantial nexus" test. *National Geographic Soc'y* v. *Cal. Bd. of Equalization*, 430 U.S. 551, 556 (1977) (expressly refusing to adopt a "slightest presence" test urged by California).

In this case, Share's business crossed the border and entered Florida only four times during the course of a five-year tax period, each time to display and sell goods at one three-day seminar. To date, this Court has never based a finding of substantial nexus on so thin a reed. The courts below recognized this and correctly held that "[t]he display of products by Share during three days at a seminar is not enough to create a 'substantial nexus' so as to allow the imposition of a sales tax against all future mail order sales. . . ."[2]

Petitioners' new test — that *any* in-state presence, irrespective of its nature, purpose or effect, creates constitutional nexus — conflicts with well-developed and clearly enunciated Commerce Clause jurisprudence.

As recently as 1992, the Court observed that not every physical presence equals substantial nexus. *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 315 n.8 (1992). In its *National Geographic* decision, the Court, in affirming a finding of substantial nexus, explained that substantial nexus means more than a minimal or sporadic relationship with a state and its consumer market. The Court carefully advised that its

> affirmance of the California Supreme Court [imposing use tax collection obligations] is not to be understood as implying agreement with that state's "slightest presence" standard of constitutional nexus. Ap-

[2] Here, Petitioners assessed Share for a full year prior to its first seminar presence and for a full year after the last seminar. Such an attempt to create retroactive and prospective "nexus," for periods in which *no* in-state presence exists, has no support in any of the decisions of this Court or in the Florida tax statutes. It also reflects a cavalier attitude about expanding the state's tax authority.

> pellant's maintenance of two offices in the State and solicitation by employees assigned to these offices of advertising copy in the range of $1 million annually . . . *establish a more substantial presence than the expression "slightest presence" connotes*. Our affirmance thus rests upon our conclusion that appellant's maintenance of the two offices in California and activities there establish a relationship or "nexus" between the Society and the State that renders constitutional the obligations imposed upon appellant. . . .

430 U.S. at 556 (emphasis added). Subsequent Court decisions underscore that both the *nature* and *extent* of the in-state presence must be examined to determine if a substantial nexus exists, a routine factual analysis which the lower courts understood and carefully applied.

For example, in *Scripto, Inc.* v. *Carson*, 362 U.S. 207, 211-12 (1960), the Court explained that the test for nexus "is simply the nature and extent of the activities of the appellant in Florida." Indeed, in 1987, this Court quoted with approval the Supreme Court of Washington's observation that a "crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are *significantly associated with the taxpayer's ability to establish and maintain a market in this state for [its] sales*." *Tyler Pipe Industries* v. *Washington State Dept. of Revenue*, 483 U.S. 232, 250 (1987) (quoting lower court) (emphasis added). Clearly, Petitioners' one-toe-over-the-state-line approach contrasts sharply with such decisions and the Commerce Clause values they reflect.

In Supreme Court cases where the requisite nexus has been found, the nature and extent of the in-state presence have far exceeded this case and have been closely tied to the establishment of a local market. In *Scripto*, for example, the taxpayer had ten resident sales brokers conducting year-round, continu-

ous solicitation of Florida residents. 362 U.S. at 211. And *Scripto*, the Court has observed, is the furthest "constitutional reach to date" of the substantial nexus test. *Quill Corp.* v. *North Dakota*, 504 U.S. at 306. *Accord National Bellas Hess, Inc.* v. *Dept. of Revenue of Illinois*, 386 U.S. 753, 757 (1967) ("the furthest constitutional reach to date . . . is *Scripto*").[3]

In the case at bar, the trial court held an evidentiary hearing and found (1) that Share's presence in Florida was extremely limited (a total of 12 days over a five-year period); (2) that Share's display of products at four professional seminars neither created nor was intended to create a Florida market for its products; and (3) that 84% of the seminar attendees resided outside of Florida. While Share sold some of its materials to seminar attendees, these sales — over 80% of which were not to Florida residents — accounted for just 0.7% of the company's total yearly gross sales. Moreover, Share obtained a seller's permit and collected and remitted Florida's sales tax on these limited seminar sales.

The clear factual findings in this case show that, unlike in *Tyler Pipe, supra*, Share's limited presence in Florida was not "significantly associated with [its] ability to establish and maintain a market in this state for [its] sales." *Tyler Pipe*, 483 U.S. at 250. To the contrary, the trial court below found that such contacts had *no* connection to Share creating a customer market in Florida. This finding is reinforced by the nature of the professional seminars in which Share participated. They were neither organized, promoted, nor attended with local markets in mind. They were interstate events in the purest sense. It would be inappropriate, from both a practical and a constitutional sense,

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[3] *See also Standard Pressed Steel Co.* v. *Washington Dept. of Revenue*, 419 U.S. 560, 561 (1975) (full-time employee with year-round office in Washington calling on in-state customers and monthly customer and prospect visits by team of engineers); *Tyler Pipe, supra*, 483 U.S. at 250 ("substantial" activity of in-state sales representatives working "daily on behalf of Tyler Pipe in calling on its customers and soliciting orders").

to allow such inherently interstate seminars to serve as a hook for state and local tax collection duties on unrelated mail order sales.

III. No Conflict Exists Among The Lower Courts As To Substantial Nexus.

Petitioners' false claim of a conflict among state courts arises from their misstatement of the nexus test applied below. Only by incorrectly reporting that "[t]he decision of the Florida Supreme Court adopted a 'substantial physical presence' standard" do Petitioners create the misimpression of a "conflict with decisions of sister states." (Petition at 18.) In each instance cited by Petitioners, the New York, Illinois, and Rhode Island decisions are consistent with *Share*.

In *The Orvis Company, Inc.* v. *Tax Appeals Tribunal*, 630 N.Y.S.2d 680, 688, 654 N.E.2d 945 (1995), *cert. denied sub nom., Vermont Information Processing, Inc.* v. *Commissioner*, ___ U.S. ___, 116 S.Ct. 518 (1995), Orvis engaged in "systematic visitation to all of its as many as 19 wholesale customers on the average of four times a year" over a three-year audit period (*i.e.*, as many as 228 customer visits over a three-year period each for an indeterminate length of time). The New York Court of Appeals based its finding of nexus not only on the frequency and continuity of these in-state sojourns, but also on the fact that Orvis' wholesale business in New York depended upon such "direct solicitation of retailers through visits to their stores in New York." 630 N.Y.S.2d at 687. The considerable factual differences between Orvis and Share — both as to the nature and extent of the in-state presence — reasonably led to different results.

In the companion case to *Orvis*, a Vermont computer system dealer ("VIP") repeatedly sent employees into New York — at least 41 times over three years — to provide after-order

services to its major New York customers, and solicited new customers based upon promises of providing in-state training and services. It was rational for the New York Court of Appeals to conclude that VIP, unlike Share, had a systematic in-state presence which "significantly contributed to VIP's ability to establish and maintain a market for computer hardware and software it sold in New York." 630 N.Y.S.2d at 688 (citing *Tyler Pipe, supra*).

Likewise, in *Brown's Furniture, Inc.* v. *Wagner*, 665 N.E.2d 795 (Ill.), *cert. denied*, ___ S.Ct. ___, 65 USLW 3252 (1996), the taxpayer used its own trucks to make 942 trips to Illinois customers during a ten-month audit period. "Testimony at trial," the court observed, "indicated that during a typical trip into Illinois, Brown's Furniture might make as many as five or six individual deliveries." 665 N.E.2d at 803. In finding a substantial nexus, the Supreme Court of Illinois readily distinguished *Brown* from cases like *Share*:

> Thus, during the audit period, Brown's Furniture was averaging between 15 and 18 trips into Illinois per month, or a minimum of about one every other day. We believe that by sending its representatives into Illinois on this *regular* and *frequent* basis, Brown's Furniture has established more than a slight physical presence within the State.

665 N.E.2d at 803 (emphasis added). These factual distinctions between *Brown* and *Share* naturally support different outcomes.

Finally, the taxpayer in *Koch Fuels* v. *Clark*, 676 A.2d 330, 334 (R.I.), *cert. denied*, ___ S.Ct. ___, 65 USLW 3288 (1996), owned and maintained "total control" over 25.6 million gallons of fuel oil sold in Rhode Island and valued at $18 million. The finding of substantial nexus was based upon such control, the Rhode Island Supreme Court explained, and also the "unique nature of the cargo." *Id.* Moreover, Koch itself

had voluntarily registered to do business in Rhode Island on a full-time basis and filed yearly income tax returns with the state reporting in-state earnings. Clearly, the facts of *Koch* are distinguishable from the minimal presence reflected in *Share*.

CONCLUSION

In *Share*, the Supreme Court of Florida applied a common sense approach to substantial nexus in a case which involved only a fleeting in-state presence. Other state courts have done the same and, by doing so, have avoided imposing use tax obligations vastly disproportionate to the minimal presence of direct marketers like Share. By carefully reviewing the facts and circumstances of each case and assessing the significance of the in-state contacts, these courts have achieved consistent and fair results. Only by manufacturing discord out of harmony do Petitioners create the impression that the "substantial nexus test" is unworkable without further Court intervention. To date, that has simply not been the case.

Respectfully submitted,

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